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No. 06-1332

In the Supreme Court of the United States

STEPHEN GILL AND MICHELLE GILL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a federal worker can bring suit against the United States in federal district court for a claim of emotional distress without first presenting the claim to the Secretary of Labor pursuant to the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 471 F.3d 204. The opinion of the district court (Pet. App. 11a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 2006. On February 9, 2007, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including March 31, 2007, and the petition was filed on March 29, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2002, petitioner Stephen Gill and his family moved to Florida, where he was to begin work as a civil-

ian attorney-advisor for the United States Navy.[1] Petitioner believed that he was being hired "to serve as a Claims Attorney-Advisor for a two-year period." Compl. para. 11. Within approximately forty-five days after he began his employment, however, petitioner was informed that his position would be terminated a few months later. *Id.* para. 15. Petitioner was given a series of short-term jobs and extensions that ended in January 2003. *Id.* paras. 18, 19, 21, 23; Pet. App. 2a.

2. Petitioners (Stephen Gill and his wife, Michelle Gill) subsequently filed suit against the United States under the Federal Tort Claims Act, seeking over $1 million in damages for negligent and intentional infliction of emotional distress and loss of consortium, service, and marital society. Compl. paras. 26-44; Pet. App. 2a. The government filed a motion to dismiss or stay the claim, arguing, *inter alia*, that because there was a substantial question whether petitioners' claims were covered by the Federal Employees' Compensation Act (FECA or the Act), 5 U.S.C. 8101 *et seq.*, the district court lacked jurisdiction over the claims unless and until the Secretary of Labor (Secretary) determined that the FECA did not apply. Pet. App. 11a.

The district court dismissed petitioners' suit for lack of subject matter jurisdiction. The court explained that it lacked jurisdiction over claims "covered under the FECA," and the question whether a claim is so covered is "entrusted to the Secretary of Labor" by statute. Pet. App. 12a (citing 5 U.S.C. 8128(b)). Thus, "unless [a plaintiff's] injuries do not present a substantial question of compensability under the act," a plaintiff "must first seek

[1] Because of the procedural posture of this case, which arises from petitioners' appeal of a decision granting the government's motion to dismiss, the facts alleged in petitioners' complaint are taken as true.

and be denied relief under the FECA" before he can bring the claim in federal court. *Ibid.* Because the court determined it was not "certain" that the Secretary would deny coverage of petitioners' claims, it dismissed the suit. *Ibid.* (emphasis omitted).

3. The court of appeals affirmed. Pet. App. 1a-10a. The court began by noting that the government's liability under the FECA for injuries sustained by federal employees in the course of employment is "exclusive and instead of all other liability." *Id.* at 3a (quoting 5 U.S.C. 8116(c)). This "exclusive liability provision . . . was designed to protect the Government from suits under statutes, such as the Federal Tort Claims Act, that had been enacted to waive the Government's sovereign immunity." *Id.* at 3a-4a (quoting *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 193-194 (1983)). The FECA thus provides a means for resolving workers' compensation claims "without need for litigation." *Id.* at 4a (quoting *Lockheed Aircraft Corp.*, 460 U.S. at 194).

To that end, the court of appeals explained, "the Act provides that '[t]he Secretary of Labor shall administer, and decide all questions arising under, [FECA].'" Pet. App. 4a (quoting 5 U.S.C. 8145) (emphasis omitted; brackets in original). The Act also "contains an unambiguous and comprehensive provision barring any judicial review of the Secretary of Labor's determination of coverage." *Ibid.* (internal quotation marks omitted) (quoting *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81, 90 (1991)). Accordingly, the court of appeals explained, it had interpreted the statute to require that "a federal employee who brings tort claims against the United States * * * 'first seek and be denied relief under the FECA unless his/her injuries do not present a substantial question of compensability under [the Act].'" *Id.* at

5a (quoting *Bruni* v. *United States*, 964 F.2d 76, 79 (1st Cir. 1992)).

The court of appeals rejected petitioners' contention that its decision in *Bruni* does not apply when there is a question whether (1) a particular injury is compensable under the Act, or (2) a plaintiff is a federal employee. The court explained that "these distinctions * * * do not make any difference to the jurisdictional inquiry" because "[t]he test when the injured party fails to seek relief under FECA is the same: whether 'it is certain that the Secretary would not find coverage.'" Pet. App. 6a (quoting *Bruni*, 964 F.2d at 79). The court rejected petitioners' reliance on *Sheehan* v. *United States*, 896 F.2d 1168 (9th Cir.), amended by 917 F.2d 424 (9th Cir. 1990), concluding that *Sheehan* was "inapposite" because in that case the Secretary "had already concluded that Sheehan's non-physical injuries were covered by FECA." Pet. App. 6a-7a.

The court of appeals also stated that, to the extent that *Sheehan* could be read to allow a court, rather than the Secretary, to make an initial determination of uncertain coverage, such a holding would be "inconsistent with * * * the statutory assignment of these questions to the Secretary." Pet. App. 7a. But the court noted that "the Ninth Circuit appears to have rejected [petitioners'] reading of *Sheehan*," limiting its applicability to those claims "'not colorable under FECA as a matter of law.'" *Ibid.* (quoting *Figueroa* v. *United States*, 7 F.3d 1405, 1408 (9th Cir. 1993), cert. denied, 511 U.S. 1030 (1994)). The court thus concluded that its decision in *Bruni* was in "accord[] with the rule in other circuits * * * that federal courts lack jurisdiction to decide uncertain questions of FECA coverage." *Ibid.* Because it was "not certain that the Secretary would deny" petitioners' claim

"for emotional distress damages," the court dismissed the case. *Id.* at 8a; see *id.* at 9a (citing cases in which the Secretary had construed the FECA to encompass work-related emotional distress).

ARGUMENT

The court of appeals' decision is correct and does not merit review.

1. Petitioners first contend (Pet. 7) that this Court's review is warranted to resolve an asserted conflict among the circuits over whether a federal court may, in the first instance, determine if a particular injury is covered by the FECA. Based upon the statutory requirement that the "Secretary of Labor * * * administer, and decide all questions arising under, this subchapter," 5 U.S.C. 8145, the courts of appeals uniformly have agreed that, "[i]f a plaintiff has a colorable claim under FECA" that has not first been presented to, and answered by, the Secretary of Labor, "the federal courts should dismiss any action arising under the same facts for lack of subject matter jurisdiction." *Moe* v. *United States*, 326 F.3d 1065, 1068 (9th Cir.), cert. denied, 540 U.S. 877 (2003). The requirement of presentation to the Secretary serves Congress's twin goals of providing employee benefits "without need for litigation," *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 194 (1983), and ensuring "uniform coverage for work-related injuries or deaths," H.R. Rep. No. 446, 105th Cong., 2d Sess. 1 (1998). See *White* v. *United States*, 143 F.3d 232, 238 (5th Cir. 1998) (recognizing that Congress did not want "two independent bodies of FECA law to develop--with the result that an employee's FECA coverage may differ depending on whether the employee first brought his case in federal court or to the Secretary").

Accordingly, when faced with claims of emotional distress like those brought by petitioners, the Fifth and Tenth Circuits have required that plaintiffs present their claims to the Secretary before bringing suit in federal court. See *Tippetts* v. *United States*, 308 F.3d 1091, 1094 (10th Cir. 2002) (holding that it was for the Secretary to determine, "as an initial matter," whether plaintiff's claim of emotional distress "f[e]ll[] within the purview of the FECA"); *Bennett* v. *Barnett*, 210 F.3d 272, 276-278 (5th Cir.) (affirming dismissal of FTCA suit brought by plaintiff who had not yet submitted a claim to the Secretary because a substantial question existed as to whether his claims for emotional distress were covered by FECA), cert. denied, 531 U.S. 875 (2000).

Petitioners rely (Pet. 10-11) upon the Ninth Circuit's decision in *Sheehan* v. *United States*, 896 F.2d 1168, 1174 (1990), to argue that a federal court has jurisdiction to determine the scope of FECA coverage even when the claim is not first presented to the Secretary. As the Ninth Circuit explained in *Figueroa* v. *United States*, 7 F.3d 1405, 1408 (1993), cert. denied, 511 U.S. 1030 (1994), however, "*Sheehan* stands only for the proposition that when a plaintiff has failed to allege a colorable claim under FECA as a matter of law, the district court should render a judgment." The court "d[id] not read *Sheehan* as altering the general rule that when a claim arguably falls under FECA, the question of coverage should be resolved by the Secretary."[2] *Ibid.* Petitioners

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[2] Indeed, in allowing the plaintiff's suit to go forward in *Sheehan*, the court of appeals did not reach an open question of FECA coverage. Rather, it was bound by a previous decision, *Guidry* v. *Durkin*, 834 F.2d 1465, 1471-1472 (9th Cir. 1987), in which the court of appeals had held, without considering whether it had the authority to do so under 5 U.S.C. 8145, that the FECA did not cover emotional injuries entirely

suggest that the Ninth Circuit has since retreated from that understanding of *Sheehan*, requiring district courts themselves to decide questions arising under the Act. See Pet. 12 (citing *Moe*, 326 F.3d at 1068). As explained above, that approach would be inconsistent with the statute. Moreover, although the Ninth Circuit stated that a question concerning the scope of the FECA must be answered by the courts, it also said that, "[i]f a plaintiff has a colorable claim under FECA, the federal courts should dismiss any action arising under the same facts for lack of subject matter jurisdiction." *Moe*, 326 F.3d at 1068. Any question concerning ambiguity in the *Moe* decision, or the Ninth Circuit's interpretation of its own case law more generally, does not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Even assuming that the Ninth Circuit's approach to determining whether a claim is "colorable" differs from that used by the other courts of appeals, the decision in

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separate from physical harm. See *Sheehan*, 896 F.2d at 1174 (citing *Guidry*, 834 F.2d at 1471-1472). Although, as explained above, the court of appeals in *Guidry* should not have reached that issue, it appears that the court was not aware of the jurisdictional bar and was simply considering whether the FECA could serve as an alternative basis for jurisdiction where it was not clear whether a state case was correctly removed to federal court. See *Guidry*, 834 F.2d at 1468-1469, 1471-1472. At any rate, the court of appeals' holding in *Guidry* that the FECA does not extend to claims of emotional distress unrelated to physical harm foreclosed any determination by the *Sheehan* court that there was a "substantial question" whether plaintiff's comparable claims fell within the scope of the Act. 896 F.2d at 1173. As the court of appeals explained in *Figueroa*, therefore, *Sheehan* did not "alter[] the general rule that when a claim arguably falls under FECA," the Secretary should determine the question of coverage in the first instance. 7 F.3d at 1408.

this case does not warrant this Court's review. The Secretary has found the FECA to cover claims of emotional distress in numerous instances, see Pet. App. 9a (citing cases), and the court of appeals thus did not err in dismissing petitioners' suit. Furthermore, any conflict among the circuits, if one existed, would be narrow, and none of the relevant decisions was reheard en banc. The Ninth Circuit accordingly retains the ability to harmonize its precedent with that of the other circuits and eliminate any conflict.

2. Petitioners additionally suggest (Pet. 14) that this Court should grant certiorari in order to "decide whether emotional distress without any physical injury is within the scope of the FECA." As discussed above, the court of appeals correctly held that the FECA tasks the Secretary with making such a determination in the first instance. See 5 U.S.C. 8145. Petitioners' invitation to review the Secretary's interpretation of the Act in this respect is necessarily an attempt to subvert that statutory grant of exclusive authority.

At any rate, this case does not warrant this Court's review. Contrary to petitioner's suggestion (Pet. 15-16), the court of appeals' decision with respect to emotional distress neither implicates a conflict among the circuits nor contravenes this Court's decision in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000).

a. Petitioners again rely upon the Ninth Circuit's decision in *Sheehan* to argue that the FECA does not extend to those cases in which "the alleged emotional distress [i]s 'divorced from any claim of physical harm.'" *Figueroa*, 7 F.3d at 1408 (quoting 896 F.2d at 1174). Contrary to petitioners' contention (Pet. 13), however, their claims are not based upon "stand-alone emotional

distress." Rather, petitioners specifically describe the alleged distress as manifesting itself in physical symptoms such as sleeplessness and fatigue. Pet. 5.

Petitioners thus have brought a claim for "psychological injury, which results in physical injury," *Moe*, 326 F.3d at 1068, a claim no court of appeals has held certainly to be beyond FECA's scope. Cf. *Spinelli* v. *Goss*, 446 F.3d 159, 161 (D.C. Cir. 2006) (holding claim for post-traumatic stress disorder should have been dismissed because "the Secretary determined that [plaintiff's] claim was covered by FECA"); *Jones* v. *TVA*, 948 F.2d 258, 265 (6th Cir. 1991) (affirming dismissal of claim for intentional infliction of emotional distress where plaintiff recovered under FECA because "work related stresses [had] caused [plaintiff] to be totally disabled"). Even if petitioners are correct (Pet. 15-16) that the FECA does not cover emotional distress divorced from physical harm, that limitation would have no bearing upon this case.

b. In any event, petitioners fail to demonstrate that the Secretary's application of the statute to claims of emotional distress is contrary to the FECA as enacted or amended. This is not, as petitioners suggest (Pet. 15 (citing *Vermont Agency*, 529 U.S. at 781-783 & n.12)), a case in which the Secretary impermissibly has ignored the definition of a statutory term as enacted. As petitioners themselves recognize (*ibid.*), the statute, as enacted in 1916, provided for compensation for "personal injury," not "physical injury." *Ibid.* And although petitioners claim that the definition of "injury" adopted in 1924, which "includes * * * any disease proximately caused by * * * employment," does not reach emotional distress, they point to no definition of "disease" that excludes mental ailments. Cf. *In re Derby*, 5 Empl. Comp.

App. Bd. 283, 286 (1953) (recognizing situations in which a "mental disability * * * is as real as any other disability and is as much a personal injury"). To the contrary, in 1924 Congress was aware that the Secretary had interpreted the FECA to cover emotional injuries, and it made no attempt to alter the statutory definition to exclude them. See 65 Cong. Rec. 8161 (referring to FECA award for "physical and mental exhaustion with paranoid symptoms").

Finally, petitioners rely on the fact that, in 1974, Congress expanded FECA's definition of "injury" to include damage to prosthetic devices and other medical equipment. They claim that change "underscor[es] the physical nature of 'injury' under the FECA." Pet. 16. As petitioners themselves explain, however, that amendment was designed to provide compensation "with respect to loss of personal property due to accident." *Ibid.* (quoting Pet. App. 20a-21a, and S. Rep. No. 1081, 93d Cong., 2d Sess. 6 (1974)). There is no indication it was designed to reverse at least a half-century of decisions by the Secretary that had awarded compensation under FECA for emotional distress. See, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (noting that "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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